United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1010

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

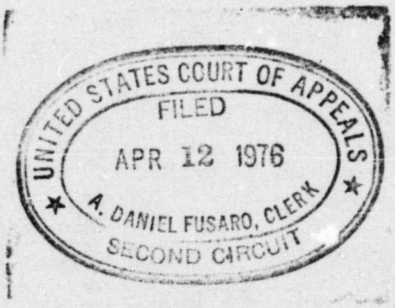
GABRIEL OCHOA,

Appellant.

Docket No. 76-1010

BRIEF FOR APPELLANT
PURSUANT TO
ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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ON APPEAL FROM A JUDGMENT
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FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether there are any non-frivolous issues to be raised on appeal for this Court's review.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York (The Honorable Whitman Knapp) rendered on August 6, 1975, after a trial before a jury, convicting Gabriel Ochoa of conspiracy to sell cocaine (Count One) and possession with intent to distribute two and one-half kilograms of cocaine (Count Two) (21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A), 846). Mr. Ochoa was sentenced to the custody of the Attorney General for a ninety-day study, pursuant to 28 U.S.C. §4208(b), and, on November 24, 1975, the District Court adopted the recommendation of the U.S. Bureau of Prisons and imposed a sentence of four years' incarceration, pursuant to 28 U.S.C. §4208(a)(2), to be followed by a three-year term of special parole.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

Appellant Gabriel Ochoa,and Essau Correa, Dario Valencia, Carlos Uribe, and Luis Osorio were charged in a three-count indictment* with conspiracy to violate the Federal narcotics laws (Count One), possession with intent to distribute approximately two and one-half kilograms of cocaine (Count Two), and possession with intent to distribute approximately one-half kilogram of cocaine.

Carlos Uribe could not be located at the trime of trial (377-378**). Essau Correa and Dario Valencia pleaded guilty to Count One, the transfer of the two and one-half kilograms of cocaine, prior to trial.***

A. The Government's Case

1. February 21, 1975

Undercover Agent Frank Marrero met Dario Valencia and Jairo Bocanumenth (30). Valencia told Marrero he and his people could supply three to four kilograms of cocaine each

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*The indictment is B to the separate appendix to the brief for appellant.

**Numerals in parentheses refer to pages of the transcript of the trial.

***See entries on the District Court docket sheet, annexed to appellant's separate appendix as A.

week (31),* and that it would be ninety percent pure (35).

2. March 4, 1975

Agent Marrero, accompanied by Undercover Agent Yanniello, met Valencia. That day Valencia supplied the agents with three samples (Exhibits #1, #2, #3 (488, 491, 492)) of cocaine (36, 39, 244, 246, 247, 487, 489, 491). Two of the samples were obtained after the three men drove to Astoria, Queens (38, 246). On this occasion Valencia again said that his people could supply three to five kilograms a week.

3. March 6, 1975

Agents Marerro and Yanniello agreed to purchase six ounces of cocaine then available from the house in Astoria (43-44).** Valencia and Agent Marrero went into the house where Essau Correa supplied two baggies of cocaine in two different forms (44, 48, 252, 492) (Exhibits #4, #5 (48, 252)). Valencia, accompanied by Carlos Uribe, went to the car where Agent Yanniello was waiting (46). Yanniello paid them $6,750 (47, 251).***

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*Defense counsel objected. The evidence was admitted under Pinkerton v. United States, 328 U.S. 640 (1940), subject to connection (32-33). Valencia also said he could get two hundred pounds of marijuana (31), to which counsel also objected. Judge Knapp ruled that he would deal with admissibility of testimony about marijuana at a later time (34).

**Additional cocaine was set to arrive that night from Connecticut (43, 249-250), but the agents did not want to wait.

***Uribe had been followed to Astoria by the agents. He was seen meeting Herman Posada (424), and Posada was seen carrying a brown paper bag and entering a building (425).

4. March 20, 1975

Valencia met Agents Marrero and Yanniello. Yanniello said he was pleased with the samples and wanted his brother, really Agent Alberti, to meet Valencia's boss. Valencia left the agents, returning shortly thereafter to report that he had set up a meeting with Correa. The agents then dropped Valencia off at Evie's Restaurant on West Street (49-51, 253-254). Inside Evie's Valencia was seen talking with Correa (458). In statements made by appellant Ochoa after his arrest he acknowledged that he was part owner of the restaurant (390-392, 607).

5. March 21, 1975

Agents Yanniello, Alberti, and Marrero met with Valencia and Correa. Alberti wanted to buy five kilograms of cocaine. Correa acknowledged dealing in that amount, but stated he would prefer to sell less because he also had other customers. Correa stated that he did not cut his cocaine and could sell one kilogram for $32,000. Valencia described difficulties in importation (51-53, 197-188, 255).

Agent Alberti stated that he did not want to limit his purchase to half a kilogram as suggested, and said he would wait until he could get a larger amount (190).

Correa left the meeting in a gold-colored station wagon and travelled to 264 West Street. A short time later he was met there by Herman Posada (459).

6. March 26, 1975

Agents Marrero and Yanniello met with Valencia (56), as had been arranged the day before (54). Agent Marrero proposed a purchase of a large quantity of drugs. Valencia wanted to sell less than the proposed amount. Agent Yanniello agreed to purchase a smaller amount as a show of good faith (56) and showed Valencia $17,000 (259). Valencia said he would talk to [redacted] (86). Later, Valencia agreed to sell the agents three kilograms for $96,000 (58).

7. March 31, 1975

Valencia told Agent Marrero that Correa was ready to do business and would sell him three kilograms of cocaine (62).

Surveillance agents saw Herman Posada, who left from his home at 2306-21 Avenue, Queens, go to a factory. Three black men subsequently arrived, followed by appellant Ochoa and Essau Correa (460). Posada then left in the car in which the three black men had arrived (461).

8. April 1, 1975

Pursuant to Valencia's earlier suggestion Agent Marrero called Valencia the next day at 1:30 p.m. about the transfer (63). Valencia suggested that they meet at 7:30 p.m. (63). The meeting between Valencia, Marrero, and Yanniello took place at 8:00 p.m., and they discussed the transfer of drugs

by switching cars.

Valencia then left the meeting. He returned shortly to say he had spoken with Correa, that delivery would occur at 10:00 p.m. Valencia gave Agent Yanniello the telephone number of a public telephone at 264 West Street, where Correa was located. Yanniello was to call there about 10:00 p.m. (65, 261).

The agents drove Valencia to the West Street address, which was Evie's Restaurant (65, 261). Valencia entered the restaurant. Shortly thereafter a man wearing white shoes came out of the restaurant, took a package from a gold-colored station wagon parked nearby, and took the package into the restaurant (65-66, 265, 446).

Valencia returned to the car and handed a brown paper bag to Agent Yanniello. The bag contained two plastic bags which held one-half kilogram of cocaine. Yanniello took a sample and returned the bag to Valencia. Valencia re-entered the restaurant. Then Valencia returned to the agents' car (268).

Valencia and Agent Marrero went together to another restaurant.* After the agents' car left (447), the man with the white shoes returned a package to the gold station wagon (447).

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*Correa wanted Valencia to stay with Marrerro and Yanniello until the transfer occurred (267). Yanniello explained that this was not possible since Yanniello had to get the money (267).

Agent Yanniello went to pick up Agent Alberti and the $100,000 (68, 268). Agents Yanniello and Alberti put the $100,000 in a small paper bag and placed it in the trunk of the Government Cadillac (192).

At about 8:50 p.m., appellant Ochoa was observed arriving at Herman Posada's house in a green van which belonged to a man named Correa whose first name was perhaps Oscar (433). Appellant Ochoa left shortly thereafter carrying a white satchel (425, 462).

At about 10:30, Agent Yanniello met Valencia and Agent Marrero at Pete's Tavern. Yanniello told Valencia to call Correa. Valencia did so and reported that Correa would be there in an hour -- about 11:30 p.m. (69).

Correa and the man wearing white shoes subsequently joined the group (70, 193, 269, 270). Correa said he wanted to revise the deal so as to sell one kilo at a time. Agent Marrero refused such a deal, and Correa abandoned the suggestion. Correa and the man with the white shoes then left (71). Correa returned between 12:30 and 1:00 a.m. (73) carrying only one and one-half kilograms (72, 270-271). He explained that he did not have the full amount because he couldn't meet his partner (72, 270-271). Agent Alberti refused to deal (195, 271). At Correa's suggestion, Alberti and Yanniello agreed to wait until 2:00 a.m., and if Correa could not get the three kilograms by that time, the deal would be off (73-74, 196, 271, 272).

At 2:00 a.m., on 85th Street and York Avenue, Agents Yanniello, Marrero and Alberti arrived in the Government car and met Correa and Valencia. Correa said he had two and one-half kilograms of cocaine. The other half-kilo, he reported, was at Evie's Restaurant (75, 196-197, 272). Alberti agreed to buy the two and one-half kilos (216-217). Correa wanted to see the money (77, 199, 272).

Yanniello agreed. He drove the Government car around the block and Alberti removed the money from the trunk. The two then returned to 85th Street and York Avenue. As they parked the car, Correa and Valencia left the car parked on the corner and approached the agents' car. Appellant Ochoa and Osario also left the bar (273).*

Agent Alberti showed Correa the money and put it away (77, 201, 274).

A cream-colored Buick pulled up alongside the agents' car. It was driven by appellant Ochoa, and Osario was riding in it as a passenger (78). Osario took a white tennis bag from the trunk of the Buick and gave it to Correa, who said it contained the cocaine (78, 201, 221, 274). Correa insisted on receiving the money; however Marrero wanted to see the contents of the bag first.

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*Apparently appellant Ochoa and Osario arrived at 85th Street and York Avenue at 1:15 a.m., parked the cream colored Buick they were driving, went into the bar, and returned to the car (148-149).

Osario took the bag back to the Buick* (78, 223, 274), and Correa then wanted to finish the deal in an apartment (79, 275). Correa and Osario, with Agents Marrero and Yanniello, entered the Buick, with appellant driving (203). Agent Alberti and Valencia, left on the street, got into the agents' car (204).

While driving, appellant Ochoa apologized to Agent Marrero for doing business in that way, said that this was the first deal with him, and indicated that in future there would be no problem or waiting. He also said that the cocaine was pure (80). At appellant's direction, Osario showed Yaniello the contents of the bag. Yaniello approved and instructed that they should return for the money. They returned to the agents' car and, on a signal, were arrested (84, 204-205). Cocaine (Exhibits #7, #8, #9) was found in the tennis bag (Exhibit #10) which was in Yaniello's possession at the time.

At 3:00 a.m. a group of Federal agents and New York City police officers seized the gold-colored station wagon at 264 West Street, took it to the Narcotics Task Force garage, and searched it (463). In the station wagon the agents found a letter from an attorney to appellant Ochoa (472-473), part of Ochoa's driver's license (467) (Exhibit #18 (475)), and half a kilogram of cocaine in two plastic bags in a brown paper bag

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*Osario hotly contested the truth or accuracy of this statement. His attorney established that this statement did not appear in the agents' reports (596-597), and argued it rigorously on summation.

(476) located under a floor board (483). The admission of this evidence was objected to (466, 473-474) as it had been earlier (Minutes of argument on motion to suppress dated June 6, 1975, Document #27 to the Record on Appeal), and the objection was overruled (474). In the earlier consideration of the motion to suppress* the evidence taken from the gold station wagon, Judge Knapp refused to hear evidence, accepting only an offer of proof by the Government concerning the incident recited earlier involving the man with the white shoes and the reference to the half kilogram being downtown. The District Court concluded that the failure of the defense to produce any evidence to show the absence of probable cause deprived them of the right to a hearing (Minutes of June 6, 1975, at 31). The prosecutor argued that the seizure of the car was proper under 49 U.S.C. §781 and United States v. LaVecchia, 513 F.2d 1210(2d Cir. 1975) (Minutes of June 6, 1975, at 14-15). Counsel argued that there was no probable cause to believe that the drugs shown by Valencia to the agents were taken by the man in "white shoes" from the station wagon and that there were no exigent circumstances justifying the absence of a warrant since the car had remained parked for eight hours.

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*The motion to suppress also included an attack on the seizure of the two and one-half kilograms of cocaine transferred at 85th Street and York Avenue. However, counsel conceded that there was probable cause for that seizure (Minutes of June 6, 1975, at 4).

The District Judge found probable cause to believe there were drugs in the car and that the length of time the car was parked was irrelevant. The motion was denied, although the Judge gave the defendants an opportunity to renew it at trial (Minutes of June 6, 1975, at 40).

B. The Defense

Valencia and Correa, both of whom had pleaded guilty, were called by the defense as witnesses. Valencia stated that he did not recall the events of April 1 and that he never knew appellant Ochoa (532-533). Correa testified that he knew Ochoa prior to April 1, but that he did not tell him there was cocaine in the cream-colored Buick (557).

Ochoa, a native of Colombia, testified that he owned Evie's Restaurant, from which he sold a variety of merchandise to his countrymen (610).* Ochoa met Correa, who came to the restaurant and occasionally to Ochoa's home (612).

About two weeks before the arrests, Ochoa met a man named Don Roberto (614). He also knew a man named Posada from whom he purchased jewelry, shoes, and clothing (615).

On April 1, 1975, Ochoa used a green van to pick up some bicycles (615) in Astoria (616). At the warehouse Ochoa saw

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*This was confirmed by the testimony of Norman Brill, who testified he had sold stereos, tape recorders, and radios to Ochoa (716-719).

three black men change cars (616).

From the warehouse Ochoa made several stops to sell bikes (617-618). Then he went to Posada's to pick up some shoes (619). He carried the shoes in a paper shopping bag (621).

He returned to the restaurant between 8:00 and 9:00 p.m. (621). About midnight or 12:30 a.m., Don Roberto asked Ochoa to drive a Buick up to York Avenue and 85th Street to give it to Correa (625); Osario drove up with Ochoa (626).

When Ochoa arrived, Correa asked him to have a drink with him at the bar (629). Then Correa met some friends in a Cadillac and returned to instruct Ochoa to park the car on First Avenue (629-630). Ochoa did so and returned to the bar where he called his brother to come pick him up (631). Then Correa told Ochoa to get the car, park it next to the Cadillac, and wait (631). Correa told Osario to take something out of the trunk of the car (632). Ochoa related that he drove away with Correa, Osario, and Yanniello. Ochoa testified that he did not speak to anyone during the ride (633).

On instructions, Ochoa then pulled the car up behind the Cadillac and was arrested (637-638).

Ochoa's brother-in-law, Gonzalo Gutierez, confirmed that appellant was at the restaurant at 10:00 p.m. and that he left around midnight. At about 1:30 a.m., Luis Ochoa, appellant's brother, received a telephone call at the restaurant, and Luis then asked Gutierez to drive him to 85th Street to meet appellant (1051).

Luis Ochoa, appellant's brother, was called as a witness, but did not confirm appellant's testimony as to his return to the restaurant at 8:00 p.m. Luis said that appellant was away from 1:00 p.m. on (784). Luis received a telephone call from appellant about 10:00 p.m. asking Luis to pick him up later at 85th Street and York Avenue (790).

C. Rebuttal

In rebuttal an Assistant U.S. Attorney testified that appellant Ochoa had given him a signed statement, which was then introduced as Government Exhibit #21. The statement was a recitation of the activities appellant Ochoa had spoken of in his trial testimony, with the additional admission of knowledge that a narcotics transaction was involved.

The Assistant U.S. Attorney testified that he had given appellant notice of his constitutional rights, that an interpreter had translated this notice of rights into Spanish, that the interpreter read this notice to appellant, and that Ochoa signed it (920-928). The Assistant U.S. Attorney did not explain that he was the adversary attorney (983). The District Court instructed the jurors that before they could consider the statement as affirmative evidence of guilt, they must find that Ochoa was advised of his constitutional rights and understood them (916). The jurors were told that the statement

could not be used for any purpose if it was not voluntary (918) or truthful (916).

Evidence was elicited that the arrest took place at 2:00 a.m. (958), that the confession was taken eleven hours later, at 1:00 p.m. (959-960), and that the case was presented to a U.S. Magistrate at 3:00 p.m. (960). Testimony showed that after the arrest Ochoa was taken to Vesey Street (1081). The record does not show where appellant was taken after that (1081-1082), whether he had any sleep or food (958-959), or was permitted access to toilet facilities.

Recalled to testify, appellant Ochoa disputed that he said he knew a narcotics deal was going on. He further testified that he had not known about the narcotics deal until after the arrest (1067).

At the conclusion of the evidence, Judge Knapp dismissed the conspiracy and "station wagon" counts as against Osario (1101), and denied motions to acquit on behalf of appellant Ochoa (1102).

D. The Charge

Counsel requested that the jurors be instructed to evaluate whether the statement given by appellant was voluntarily made. Counsel stated that there was no suggestion that the statement was compelled; the questions, he said, were whether appellant understood his rights and whether the interpreter

accurately translated the questions and answers (1117).

On the confession, Judge Knapp gave the following charge:*

> Of course, the very first thing you have to decide is whether the statements that have been submitted to you -- either, as in the case of Ochoa, through a document signed by him or, as in the case of Osorio, by Mr. Nesland's recollection of what Osorio had told him -- I thought somebody said something; it is just the interpreter -- were actually made by Osorio and Ochoa, by the defendants, and whether they or either of them understood what they were saying at the time they said it.
>
> Obviously, if you conclude that a defendant either didn't actually say what he is claimed to have said or didn't understand either the statement or the questions in respect to which it was made, you will pay no attention whatever to such statement for any purpose.
>
> In coming to that conclusion, you will of course consider all the evidence you have heard, but perhaps crucial to the question is your appraisal of Mrs. Seltzer [**]. Her testimony certainly must be fresh in your minds. I don't see any purpose in discussing it in any detail.
>
> The question which you have to decide, based on everything you heard her say or heard said about her or observed about her, is: Do you think she was capable of and did make the respective defendants understand the questions which were being put to them, and, if so, was she capable of and did she accurately translate their answers? If you answer these questions in the affirmative, you then must consider what use is to be made of the statements.
>
> Of course, in considering this proposition you must take into account all the arguments you have heard on this subject, including the

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*The complete charge is C to appellant's separate appendix.

**The interpreter.

argument that Mrs. Seltzer and the defendants came from different cultures. You heard Mrs. Seltzer address herself to that problem, and you heard her testify, and your obligation is to make up your mind: Did she convince you that she explained what was being said to them, and did she understand what they were saying and properly repeat it?

If you come to that conclusion, then, that these statements were understandingly made, you must then consider what use you should make of them. There are two uses you can make of a statement, as I told you at the time they were being given. One, you can use it under some circumstances as evidence against a defendant, and in other circumstances merely as a touchstone for appraising his credibility if he should say something different on the witness stand than he had said previously.

Obviously, the first is the more important use. It is affirmative evidence against him. And before you can use it for that, you must be satisfied of various things. In the first place, of course, you must be satisfied that what he was saying he was saying voluntarily. He wasn't talking because he was under pressure or any kind of threats were being made to him; he was talking voluntarily. The next thing you must be satisfied of is that he knew he did not have to say anything if he did not want to, and anything he did say could be used against him if he said it. The next thing you must be satisfied of is that he knew he was entitled to a lawyer if he wanted a lawyer, and didn't have to say anything in the absence of a lawyer and didn't have to keep on talking in the absence of a lawyer.

The next thing you must be satisfied with is that he knew if he did not have enough money to retain a lawyer, the judge -- not me, but the magistrate, who was the next judicial officer he was to see -- would appoint a lawyer for him and the Government would finance such. And if he wanted to

> wait until all that had been taken care of, either wait until he got his own lawyer or wait until the judge appointed a lawyer for him, he was at liberty to do so.
>
> If you are satisfied that he understood all that -- not merely that it was said to him by somebody, but that he understood it -- then you may consider what he said as affirmative evidence against him. If you are not satisfied with all those things, then you may only consider his statement as a guide for considering his credibility as a witness to the extent that he may have said something different now than he said before.
>
> (Appendix C, 1245-1248).

After the charge and deliberations, the jury convicted appellant of conspiracy and possession with intent to distribute two and one-half kilograms of cocaine. The jury acquitted him of the count concerning the half kilogram of cocaine found in the gold station wagon.*

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*The jury acquitted Osario.

STATEMENT OF POSSIBLE LEGAL ISSUES ON APPEAL

1. Seizure and search of the gold station wagon

Prior to trial counsel made a motion to suppress the cocaine and the letter and driver's license taken from the gold station wagon parked near Evie's Restaurant. The vehicle had been seized by agents working as part of the Task Force team after the arrest of appellant Ochoa and the others. The seizure took place a substantial distance from the arrests. The seizure was made without a warrant, althoguh the station wagon had been parked and stationary for several hours and there was no danger of its removal. The Government argued that the conduct of the officers had been authorized by 49 U.S.C. §781. The District Court denied the motion without a hearing.

Whatever the legal challenge to the denial of a hearing and the motion and the admissibility of the cocaine and documents found in the vehicle, the issue is rendered of no significance because appellant was acquitted of Count Three of the indictment, the count which concerned the vehicle.

The only basis on which the jurors were told they could find appellant guilty of Count Three was under Pinkerton v. United States, supra. An acquittal necessarily meant that the drugs found in the vehicle were not part of the conspiracy. It also signified that the jurors did not use the letter and license

found in the car to connect appellant Ochoa with the conspiracy.

2. The confession

Counsel argued that there was no question of the voluntariness of the confession -- only whether appellant understood his rights and whether the questions and answers were accurately translated. The jurors were told (see 18 U.S.C. §3502) that they had to find that appellant understood his rights and the questions asked, and that they had to find that the translations were accurate in order to use the confession as affirmative evidence. Comprehension was left for the jurors to decide.

Further, although the arraignment was delayed until 3:00 p.m., some twelve hours after arrest, thus raising the spectre of the detour through the U.S. Attorney's office (United States v. Duvall, slip opinion 2123, 2137 (2d Cir., February 26, 1976), the issue was neither raised nor factually developed at trial.

CONCLUSION

For the foregoing reasons, there are no non-frivolous issues presented by this case to raise for review by this Court; accordingly, the motion pursuant to Anders v. California, 386 U.S. 738 (1966), relieving The Legal Aid Society, Federal Defender Services Unit, as counsel for appellant, should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

April 12, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York and to appellant Ochoa.